

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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JOHN MAKRANSKY,

Plaintiff(s),

v.

DAVID DOTO, et al.,

Defendant(s).

Case No. 2:16-CV-563 JCM (CWH)

ORDER

Presently before the court is defendants David Doto and Jenna Wells-Doto's motion to dismiss (ECF No. 18) plaintiff John Makransky's first amended complaint (ECF No. 17). Plaintiff has filed a response (ECF No. 19), and defendants have filed a reply (ECF No. 20).

I. Background

The instant dispute involves allegations that Mr. Doto and his wife, Mrs. Wells-Doto, (hereinafter collectively referred to as "the Dotos") failed to repay a \$171,700 loan to Mr. Makransky. (ECF No. 17 at 6). In September 2013, Mr. Doto allegedly approached Mr. Makransky, with authority from Mrs. Wells-Doto, to request a loan on both defendants' behalf. (*Id.* at 2). Plaintiff maintains that Mr. Doto claimed he and his wife were having "severe financial difficulties" and had "no money to live on." (*Id.*). Allegedly, the parties agreed to a \$5,000 per month loan, holding the Dotos jointly liable for repayment as they would collectively share its use and benefit. (*Id.* at 2–3). Mr. Makransky claims that the terms of the loan also included reimbursement for his tax liability stemming from a premature withdrawal of funds from his individual retirement account to fund the loan. (*Id.* at 3). Plaintiff contends that on October 14, 2013, the Dotos filed for divorce and that, soon after their divorce, they requested an increase in the loan installments to \$9,000 per month. (*Id.*).

1 As alleged, the loan installments lasted from October 2013 through April 2015. (*Id.*).
 2 Plaintiff maintains that, throughout this period, Mr. Doto had regular communication with Mr.
 3 Makransky; each month he asked for money and updated Mr. Makransky on the Dotos' financial
 4 status. (*Id.*). On October 23, 2013, Mr. Doto allegedly wrote to Mr. Makransky, "[a]s I told you
 5 my gratitude – our gratitude – cannot be adequately expressed," and on July 9, 2014, Mr. Doto
 6 supposedly told Mr. Makransky, "[Mrs. Wells-Doto] will graduate from paralegal school in
 7 October and . . . [t]hat should begin to pay off" (*Id.* at 4). Plaintiff contends that by April
 8 2015, Mr. Makransky stopped granting monthly installments on the loan and began demanding
 9 repayment from the Dotos within a reasonable time. (*Id.* at 7).

10 Plaintiff contends that the Dotos began making monthly payments on the loan beginning
 11 October 9, 2015. (*Id.*) Allegedly, the Dotos repaid \$200–\$300 on the loan each month, and
 12 these loan payments were drawn from the Dotos' joint bank account at Nevada State Bank. (*Id.*
 13 at 8). Mr. Makransky claims he requested that the Dotos substantially increase their payments
 14 on the loan because their payments were unreasonably small. (*Id.* at 8–9). In response, Mr. Doto
 15 allegedly stated he was unable to repay the loan at an increased rate, and that he could not "tap
 16 into [Mrs. Wells-Doto]'s money" because "[t]hat money isn't mine and [Mrs. Wells-Doto] needs
 17 that" (*Id.* at 8.)

18 Mr. Makransky's first amended complaint alleges six claims, each against both
 19 defendants: (1) breach of contract; (2) breach of the duty of good faith and fair dealing; (3)
 20 money had and received; (4) quantum meruit; (5) fraudulent transfers; and (6) fraud and
 21 conspiracy to defraud. (ECF No. 17) Defendants' motion to dismiss seeks to dismiss counts one
 22 through four against Mrs. Wells-Doto, and counts five and six in their entirety. (ECF No. 18)

23 **II. Legal Standard**

24 *a. Motion to dismiss*

25 The court may dismiss a plaintiff's complaint for "failure to state a claim upon which relief
 26 can be granted." Fed. R. Civ. P. 12(b)(6). A properly pled complaint must provide "[a] short and
 27 plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2).
 28 Although rule 8 does not require detailed factual allegations, it does require more than labels and

1 conclusions. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Furthermore, a formulaic
2 recitation of the elements of a cause of action will not suffice. *Ashcroft v. Iqbal*, 556 U.S. 662,
3 677 (2009) (citation omitted). Rule 8 does not unlock the doors of discovery for a plaintiff armed
4 with nothing more than conclusions. *Id.* at 678–79.

5 To survive a motion to dismiss, a complaint must contain sufficient factual matter to “state
6 a claim to relief that is plausible on its face.” *Id.* A claim has facial plausibility when the plaintiff
7 pleads factual content that allows the court to draw the reasonable inference that the defendant is
8 liable for the misconduct alleged. *Id.* When a complaint pleads facts that are merely consistent
9 with a defendant’s liability, and shows only a mere possibility of entitlement, the complaint does
10 not meet the requirements to show plausibility of entitlement to relief. *Id.*

11 In *Iqbal*, the Supreme Court clarified the two-step approach district courts are to apply
12 when considering a motion to dismiss. *Id.* First, the court must accept as true all of the allegations
13 contained in a complaint. However, this requirement is inapplicable to legal conclusions. *Id.*
14 Second, only a complaint that states a plausible claim for relief survives a motion to dismiss. *Id.*
15 at 678. Where the complaint does not permit the court to infer more than the mere possibility of
16 misconduct, the complaint has “alleged – but not shown – that the pleader is entitled to relief.” *Id.*
17 at 679. When the allegations in a complaint have not crossed the line from conceivable to
18 plausible, plaintiff’s claim must be dismissed. *Twombly*, 550 U.S. at 570.

19 The Ninth Circuit addressed post-*Iqbal* pleading standards in *Starr v. Baca*, 652 F.3d 1202,
20 1216 (9th Cir. 2011). The *Starr* court held:

21 First, to be entitled to the presumption of truth, allegations in a complaint or
22 counterclaim may not simply recite the elements of a cause of action, but must
23 contain sufficient allegations of underlying facts to give fair notice and to enable
24 the opposing party to defend itself effectively. Second, the factual allegations that
are taken as true must plausibly suggest an entitlement to relief, such that it is not
unfair to require the opposing party to be subjected to the expense of discovery and
continued litigation.

25 *Id.*

26 *b. Fraud*

27 Allegations of fraud are subject to a heightened pleading standard. *See Fed. R. Civ. P.*
28 9(b). Rule 9(b) operates “to give defendants notice of the particular misconduct which is alleged,”

1 requiring plaintiffs to identify “the circumstances constituting fraud so that the defendant can
 2 prepare an adequate answer from the allegations The complaint must specify such facts as
 3 the times, dates, places, benefits received, and other details of the alleged fraudulent activity.”
 4 *Neubronner v. Milken*, 6 F.3d 666, 671–72 (9th Cir. 1993) (citations omitted). Moreover, Rule
 5 9(b) provides that “[m]alice, intent, knowledge, and other conditions of a person’s mind may be
 6 alleged generally.” *Id.*

7 **III. Discussion**

8 *a. Amended complaint*

9 Defendants contend the amendments to the initial complaint must be rejected because they
 10 contradict the allegations contained in the initial complaint. (ECF No. 18 at 4–5). The court
 11 disagrees. It is well-established that an “amended complaint supersedes the original, the latter
 12 being treated thereafter as non-existent.” *Valadez-Lopez v. Chertoff*, 656 F.3d 851, 857 (9th Cir.
 13 2011) (quoting *Forsyth v. Humana, Inc.*, 114 F.3d 1467, 1474 (9th Cir. 1997)). Once an amended
 14 complaint is on record, the initial complaint no longer exists. *See id.*

15 The cases defendants cite to support their argument, *Reddy v. Litton Industries, Inc.*, 912
 16 F.2d 291, 291 (9th Cir. 1990), and *Johnson v. Lucent Technologies, Inc.*, 653 F.3d 1000, 1012 (9th
 17 Cir. 2011), deal with a court’s ability to grant leave to amend in instances where any amendments
 18 made to the original complaint would contradict the initial allegations. Alternatively, an
 19 amendment under Federal Rule of Civil Procedure 15(a)(1)(B) is done “as a matter of course” and
 20 does not require leave to amend. *Rhoades v. Avon Products, Inc.*, 504 F.3d 1151, 1158 n.5 (9th
 21 Cir. 2007).

22 Here, plaintiff exercised his right under Federal Rule of Civil Procedure 15(a)(1)(B) to
 23 amend his complaint once as a matter of course. The court finds that the amended complaint
 24 superseded the original complaint. *See id.*; *Valadez-Lopez*, 656 F.3d at 857.

25 *b. Parties to the contract*

26 Defendants argue that Mrs. Wells-Doto should be dismissed from this action because she
 27 was never a party to the contract. This argument fails as “apparent authority, including a third
 28 party’s reasonable reliance on such authority, is a question of fact.” *Great Am. Ins. Co. v. Gen.*

1 *Builders, Inc.*, 934 P.2d 257, 261 (Nev. 1997). Currently, the court must view all facts in favor of
2 the non-movant; the court finds sufficiently plead facts illustrating the plausibility of Mrs. Wells-
3 Doto being a party to the contract. *See Iqbal*, 556 U.S. at 677.

4 Defendants' assertion of a factual void alleging Mr. Doto's authority to act on her behalf
5 is unpersuasive. The e-mail communications between the parties, as argued in the amended
6 complaint, contain sufficient non-conclusory factual allegations to establish Mrs. Wells-Doto as a
7 party to the underlying contract. *See Great Am. Ins. Co.*, 934 P.2d at 261; (ECF No. 17 at 3–5).
8 Specifically, the January 8, 2016, e-mail whereby Mrs. Wells-Doto wrote to Mr. Makransky
9 concerning specific details of the agreement carries significant weight. (ECF No. 17 at 5).
10 Moreover, she denoted herself as one who could change the current payment schedule and one
11 who would be responsible for keeping Mr. Makransky informed. (*Id.*). This allegation, *inter alia*,
12 is fatal to defendants' argument because it sufficiently reveals Mrs. Wells-Doto's involvement as
13 a party to the contract.

14 *c. Alleged fraudulent conduct*

15 For the purposes of the instant motion, plaintiff must allege sufficient plausibility for each
16 element of a claim for fraud. Fraud requires a showing of (1) "a false representation made by the
17 defendant;" (2) defendant's knowledge or belief that the representation is false (or insufficient
18 basis for making the representation); (3) defendant's intent to induce plaintiff to act in reliance on
19 the misrepresentation; (4) plaintiff justifiably relied on the misrepresentation; and (5) plaintiff
20 suffered damages from such reliance. *Bulbman, Inc. v. Nevada Bell*, 825 P.2d 588, 592 (Nev.
21 1992).

22 Defendants argue that no fraudulent activity occurred because Mr. Doto used the loan
23 proceeds as he represented he would. (ECF No. 18 at 7–9). Defendants' failure to even
24 acknowledge plaintiff's allegation that the loan was procured through misrepresentation is notable.
25 As stated in the amended complaint, the defendants acquired this loan by representing to Mr.
26 Makransky that they were having "severe financial difficulties," that they had "no money to live
27 on," and that they "needed [the money] to pay for necessities such as food, clothing, and shelter."
28 (ECF No. 17 at 2). These alleged representations continued throughout the lifetime of the loan.

1 (*Id.* at 2–6). In contrast, plaintiff claimed—with specificity in location and value—the substantial
 2 assets that defendants possessed. (ECF No. 17 at 9).

3 Defendants’ alleged representations to Mr. Makransky conflict with the claimed reality of
 4 defendants’ financial position. As stated in the amended complaint, defendants had the financial
 5 means to participate in weekend wine tasting, travel for vacation, dine at fine restaurants, purchase
 6 clothes in boutique stores, and attend live shows. (*Id.* at 10). The alleged facts do not suggest a
 7 lifestyle of a person who needs “[money] to pay for necessities such as food, clothing, and shelter.”
 8 (*Id.* at 2). Taking these allegations as true, the court agrees with plaintiff that, either defendants
 9 misused the loan proceeds to pay for these luxuries, or defendants misled Mr. Makransky regarding
 10 their financial well-being. Either way, the alleged fraudulent conduct was sufficiently plead with
 11 particularity in accordance with Federal Rule of Civil Procedure 9(b) to sustain the first two
 12 elements of fraud.

13 The first two elements are sufficiently pleaded, as detailed above, by the claims of
 14 defendants’ represented financial situation coupled with their conspicuous consumption. The third
 15 element is sufficiently pleaded as the aforementioned alleged misrepresentations were coupled
 16 with a loan request. (ECF No. 17 at 2–3). Element four is similarly well-pleaded as plaintiff
 17 argues that he began and continued loaning defendants money based on these alleged
 18 misrepresentations. (*Id.* at 6). The final element is sufficiently pleaded as plaintiff offered dates
 19 of each loan installment and amounts of monies lent which have yet to be repaid, as well as
 20 additional tax liability incurred from the loan. (*Id.* at 6–7).

21 *d. Conspiracy to defraud*

22 To sustain a claim for conspiracy to defraud under Nevada law, plaintiff must sufficiently
 23 allege: (1) an agreement of two or more persons “who, by some concerted action, intend to
 24 accomplish an unlawful objective for the purpose of harming another; (2) an overt act of fraud in
 25 furtherance of the conspiracy; and (3) resulting damages to the plaintiff.” *Jordan v. State ex rel.*
 26 *Dept. of Motor Vehicles and Pub. Safety*, 110 P.3d 30, 51 (Nev. 2005), *overruled on other grounds*
 27 *by Buzz Stew, LLC v. City of N. Las Vegas*, 181 P.3d 670, 672 n.6 (Nev. 2008).

1 As previously discussed, the court finds ample allegations in the amended complaint to
2 sustain a claim for fraud. (ECF No. 17 at 2–3, 6–7). Defendants’ arguments on the legitimacy of
3 an underlying claim for fraud are irrelevant.

4 Defendants’ alternative argument is that plaintiff failed to allege with specificity any
5 agreement between Mr. Doto and Mrs. Wells-Doto. While it is true plaintiff did not allege a
6 specific moment in time that the defendants explicitly agreed to defraud Mr. Makransky, it is
7 similarly true that the standard does not require plaintiff to allege such a moment. Rather,
8 plaintiff’s claims must give rise to “a plausible suggestion of conspiracy.” *Twombly*, 550 U.S. at
9 565–66 (2007). The court finds that plaintiff’s claims do give rise to a plausible suggestion of
10 conspiracy.

11 As previously concluded, the offered facts allude to Mrs. Wells-Doto being a party to the
12 loan agreement. (ECF No. 17 at 3–5). The alleged conversations between the defendants and
13 plaintiff likewise exhibit cooperation on behalf of the defendants in an endeavor to secure and
14 potentially repay the loan. *See (id.)*. Further elucidating a conspiracy are the allegations regarding
15 timing of the loan’s increased rate in light of the divorce, Mr. Doto’s subsequent writings about
16 Mrs. Wells-Doto, and the defendants’ eventual remarriage.

17 Notably, defendants maintain that the alleged remarriage would effectively nullify the
18 presumed fraudulent nature of the divorce—exhibiting a lack of intent. (ECF No. 18 at 8–9). That
19 defendants might have ultimately failed to protect their allegedly fraudulently acquired funds is
20 irrelevant when determining their intent in trying. The claims must show the intentional nature of
21 defendants’ alleged misrepresentations in attempting to fraudulently secure the loan; they have
22 done so. *See, e.g., Bulbman, Inc.*, 825 P.2d at 592 (finding that no intent existed as
23 misrepresentation was not an intentional lie); (ECF No. 17 at 3–5).

24 The issue of damages is not disputed, and, as previously stated, is sufficiently well plead.
25 (*Id.* at 6–7). Considering the various specifically plead allegations, the court finds that plaintiff
26 has claimed facts that give rise to a plausible claim of conspiracy to defraud.

1 *e. Fraudulent transfer*¹

2 Lastly, Nevada Revised Statute (“NRS”) 112.190 establishes a claim for relief for
3 fraudulent transfers and requires plaintiff to show that (1) the creditor’s claim arose before the
4 transfer was made; (2) the debtor did not receive a “reasonably equivalent value in exchange for
5 the transfer;” and (3) the debtor was insolvent at the time of the transfer. NRS 112.160 states, *inter*
6 *alia*, “[a] debtor who is generally not paying his or her debts as they become due is presumed to
7 be insolvent.”

8 Plaintiff maintained that Mr. Doto made transfers of money for the benefit of Mrs. Wells-
9 Doto to “pay for or furnish her with food, shelter, clothing, medical care, travel, entertainment,
10 luxuries and like items.” (ECF No. 17 at 16). To sustain a claim, plaintiff must first show that the
11 alleged transfer occurred after the obligation was incurred. NRS 112.190. Plaintiff claimed that
12 the transfers occurred between November 12, 2013, and November 30, 2015. (ECF No. 17 at 16).
13 Allegedly, defendants began incurring debts on October 2, 2013, when the first loan installment
14 was paid. (*Id.* at 6).

15 Second, plaintiff must show that the debtor did not receive a reasonably equivalent value
16 in exchange for the transfer. NRS 112.190. Allegedly, Mr. Doto received no valuable
17 consideration for these transfers to Mrs. Wells-Doto. (ECF No. 17 at 16). The alleged transfers
18 to Mrs. Wells-Doto included purchases of items and services for another person and as such Mr.
19 Doto would receive no equivalent benefit. (*Id.*).

20 Finally, plaintiff must show the debtors’ insolvency at the time of the transfer. NRS
21 112.190. Defendants argue that plaintiff failed to properly propound facts to satisfy NRS
22 112.160’s requirement for insolvency. (ECF No. 18 at 9–10). The court disagrees. As previously
23 discussed, the court found sufficient allegations relating to Mr. Doto’s communications with Mr.

24
25 ¹ The court recognizes a potential conflict between the fraudulent transfer claim and the
26 allegation that Mrs. Wells-Doto is a party to the agreement. Federal Rule of Civil Procedure
27 8(d)(2) permits parties to “set out 2 or more statements of a claim or defense alternatively or
28 hypothetically” Moreover, a “party may state as many separate claims or defenses as it has,
regardless of consistency.” Fed. R. Civ. P. 8(d)(3) (emphasis added). “Our ordinary Rules
recognize that a person may not be sure in advance upon which legal theory she will succeed, and
so permit parties to . . . state as many separate claims or defenses as the party has regardless of
consistency.” *Cleveland v. Policy Mgt. Sys. Corp.*, 526 U.S. 795, 805 (1999) (citation omitted).

1 Makransky claiming that he was having “severe financial difficulties” and would need a loan
2 simply to “buy groceries this month.” (ECF 17 at 8). These alleged personal admissions are
3 sufficient to establish the plausibility of insolvency. Therefore, plaintiff has plead facts that give
4 rise to a plausible claim of fraudulent transfer.

5 **IV. Conclusion**

6 Plaintiff’s amended complaint could not contradict his original complaint as the amended
7 complaint supersedes the original complaint such that the latter no longer exists.

8 Based on the alleged facts, Mrs. Wells-Doto’s involvement in the contract gives rise to
9 the plausibility of her being a party to that contract. She supposedly gave authority to Mr. Doto
10 to request the loan and further reinforced her position as a party to the contract in the alleged
11 January 8, 2016, e-mail.

12 Plaintiff offered specific facts in his amended complaint to sustain a claim for fraud under
13 Federal Rule of Civil Procedure 9(b). These claims contain specific dates and conduct, both
14 contributing to Mr. Doto’s alleged misrepresentations to Mr. Makransky. The amended
15 complaint contains sufficient allegations to plausibly establish each element of a claim for fraud.
16 The court rejects defendants’ argument that no alleged misrepresentation occurred as the funds
17 of the loan were used for the claimed purpose.

18 Both the conspiracy to defraud claim and the fraudulent transfer claim were sufficiently
19 plead. Taken as true, the offered facts in the amended complaint adequately support these
20 claims. Based on the foregoing, defendants’ motion to dismiss is denied.

21 Accordingly,

22 IT IS HEREBY ORDERED, ADJUDGED, and DECREED that defendants David Doto
23 and Jenna Wells-Doto’s motion to dismiss plaintiff John Makransky’s amended complaint (ECF
24 No. 18) be, and the same hereby is, DENIED.

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1 IT IS FURTHER ORDERED that defendants David Doto and Jenna Wells-Doto's
2 motion to dismiss plaintiff John Makransky's original complaint (ECF No. 15) be, and the same
3 hereby is, DENIED as moot.

4 DATED January 27, 2017.

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6 UNITED STATES DISTRICT JUDGE
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